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No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

CENTRAL WEST VIRGINIA
DEVELOPMENT CORPORATION,
Petitioner,

v.

LLOYD B. FRY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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35pp

QUESTION PRESENTED

Did the decision of the Court of Appeals for the Fourth Circuit in this case dismissing the case as moot - - without even addressing the exceptions to the mootness doctrine under State and Federal decisions - - violate the petitioner's right to due process of law under the Fifth Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES	i
TABLE OF CONTENTS	ii
INDEX TO APPENDICES	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CORPORATE DISCLOSURE	2
CONSTITUTIONAL AND STAUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	20

INDEX TO APPENDICES

APPENDIX A

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS 1a

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA 5a

APPENDIX C

OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA 8a

TABLE OF AUTHORITIES

CASES: PAGE(S)

Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 19

Carolin Corporation v. Miller, 886 F. 2d 693 (4th Cir. 1989) 4, 7, 11, 12, 13, 14, 15, 17, 18

In Re Phoenix Piccadilly Ltd., 894 F. 2d 1393 (11th Cir. 1988) 12

Leonard v. Hammond 804 F. 2d 838 (4th Cir. 1986) 16

Lloyd v. Board of Supervisors of Elections, 206 Md. 36 111 A 2d 379 (1954) 17

Taylor v. Gill Street Investments, 743 P. 2d 345 (Alaska 1987) 17

West Virginia Education Association v. Consolidated Public Retirement Board 194 W.Va. 501 460 S.E. 2d 747 (1995) 16, 17

STATUTES AND RULES

11 U. S. C. 102 A 1 14

11 U. S. C. 109 14

11 U. S. C. 349 14

11 U. S. C. 363 (m) 4

11 U. S. C. 1112 (B)..... 14

28 U. S. C. 1254 (1)..... 1

28 U. S. C. 2101 (c)..... 1

CONSTITUTIONAL PROVISIONS:

Fifth Amendment to United States Constitution 3, 18

United States Constitution 3

OTHER

LEGAL TREATISE

5 Am. Jur. 2d Appellate Review §648 (1995)..... 16

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

The opinion of the United States Bankruptcy Court appears at Appendix C to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided this case was October 26, 1999

No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and §2101(c).

IN THE SUPREME COURT OF THE

UNITED STATES

No. _____

CENTRAL WEST VIRGINIA
DEVELOPMENT CORPORATION,

Petitioner,

Vs.

LLOYD B. FRY,

Defendant.

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER
ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION PURSUANT TO RULE 29(6)

Pursuant to Central West Virginia Development Corporation who is petitioner, makes the following disclosure:

1. Is the petitioner a publicly held corporation or other publicly held entity? (check one) ( ) Yes (X) No

2. Is the petitioner a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity?

(check one) ( ) Yes (X) No

3. There is no parent or publicly held company owning ten per cent (10%) or more of the petitioner's stock.

4. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation? (check one) ( ) Yes (X) No

(signature) (date)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Fifth Amendment, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public

use, without just compensation.

11 U.S.C. §363 (m) provides:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

STATEMENT OF THE CASE

A. Nature of the Case.

Central West Virginia Development Corporation filed for Chapter 11 Bankruptcy relief and the Bankruptcy Court dismissed the bankruptcy filing under the terms of *Carolin Corporation v. Miller*, 886 F. 2d 693 (4th Cir. 1989), as a bad faith filing.

B. The Course of the Proceedings.

On April 12, 1996, Central West Virginia Development Corporation, Petitioner, filed for Chapter 11 Bankruptcy Relief before the United States Bankruptcy Court for the Northern District of West Virginia. On April 3, 1997, the office the United States Trustee filed its Motion to Dismiss this bankruptcy filing and requested an expedited hearing on such Motion. On

April 29, 1997, the Judge of the Bankruptcy Court, Honorable L. Edward Friend, dismissed, without prejudice,

the Petitioner's first bankruptcy filing.

On July 3, 1997, Central West Virginia Development Corporation, Petitioner, filed its second petition for Chapter 11 Bankruptcy Relief before the United States Bankruptcy Court for the Northern District of West Virginia.

In conformance with Bankruptcy law, the Petitioner, by and through its officers and agents, appeared before the Office of the United States Trustee for the Section 341 Meeting of Creditors.

On September 4, 1997, Lloyd Fry, Respondent, filed his Motion to Dismiss the Petitioner's second bankruptcy filing, with his supporting memorandum.

In response to such Dismissal Motion, Counsel for Central West Virginia Development Corporation, filed its Plan to Pay Creditors and written Response to the Motion to Dismiss.

On September 25, 1997, the Bankruptcy Court held a hearing on the Motion to Dismiss, at which the Court orally declared that the Petitioner's second bankruptcy filing would be dismissed.

The Petitioner then filed its Post Dismissal Motions and a Motion for a Stay with the Bankruptcy Court. Such motions were denied by the Bankruptcy

Court by order entered on October 15, 1997.

The Petitioner then filed its Amended Notice of

Appeal with the District Court and the Appeal was docketed with the United States District Court for the Northern District of West Virginia, on October 21, 1997.

The Petitioner then filed its written Motion for Stay of Judgment with the District Court.

On October 23, 1997, the District Court, Robert E. Maxwell, Senior Judge, held a hearing on the Petitioner's Motion for Stay of Judgment. At the conclusion of such hearing, Judge Maxwell entered an order refusing to award the Petitioner a stay of the Bankruptcy Court's order.

The Petitioner then made application to the United States Court of Appeals for the Fourth Circuit for an emergency stay in Case Number 97-2458, but such stay was denied by the Honorable M. Blaine Michael on October 28, 1997.

Upon denial of all stays, the only asset of the Petitioner was transferred to the Respondent on the order of the Circuit Court of Harrison County, West Virginia.

With denial of its Stay Applications, the Petitioner filed its brief to the District Court on December 5, 1997. Pursuant to the parties' stipulation and the District Court's order, the Respondent filed his 7

brief on January 12, 1998.

C. Disposition by the Courts Below.

On October 2, 1997, L. Edward Friend, Judge of the United States Bankruptcy Court for the Northern District of

West Virginia dismissed the Petitioner's Chapter 11 Bankruptcy Petition under *Carolin Corporation v. Miller*, 886 F. 2d 693 (4th Cir. 1989).

On February 20, 1998, Robert E. Maxwell, Senior, Judge of the United States District Court for the Northern District of West Virginia, as a reviewing appellate court, issued an alternative ruling. The District Court granted the Respondent's Motion to Dismiss the appeal as moot, but the District Court went on to affirm the Bankruptcy Court's actions, upon a consideration of the appeal on the merits.

The Petitioner then filed a Petition for Rehearing on March 2, 1998. The post judgment motion was denied by the District Court, by order entered on March 12, 1998.

The Petitioner then filed its Notice of Appeal on March 23, 1998, with the United States Court of Appeals for the Fourth Circuit. On October 26, 1999 the Court of Appeals for the Fourth Circuit dismissed the Petitioner's appeal as moot.

D. Statement of Relevant Facts.

Central West Virginia Development Corporation was incorporated in 1992, with the intention of developing an unimproved fifty (50) acre tract of real estate near Interstate Seventy-Nine (79) and U. S. Route Fifty (50) in Harrison County, West Virginia. In both of its bankruptcy filings, the Corporation listed "commercial real estate development" as the nature of its business. The Corporation contacted the Respondent, Lloyd Fry, about the project and he provided

the funding for the purchase of the real estate and took two (2) notes and two (2) Deeds of Trust on the property. Such notes were due and payable on November 18, 1993, and Central West Virginia Development Corporation did not pay the notes as they fell due. Thereafter from November, 1993 to August, 1995, Central West Virginia Development Corporation and Lloyd Fry entered into a series of agreements to find a buyer for the real estate and to pay off Mr. Fry.

When no buyer was found and the notes remained unpaid, Mr. Fry, in August, 1995, filed suit in the Circuit Court of Harrison County, West Virginia, to foreclose on the real estate and collect all sums due on his notes. In addition to this State Court litigation, Mr. Fry continued to set foreclosure sales of the Corporation's real estate, which lead to the first bankruptcy filing on April 12, 1996. During the first bankruptcy filing, an agreed order was entered by the Bankruptcy Court to sell the Corporation's real estate at a public auction. Such public auction was not consummated and the United States Trustee filed to dismiss the first bankruptcy filing.

Following a hearing on April 25, 1997, the first filing was dismissed, without prejudice, by the Honorable L. Edward Friend, Judge of the Bankruptcy Court, on April 29, 1997. In such Order, Judge Friend did not set forth any facts that justified denying the Corporation future access to the Bankruptcy Court.

After the Bankruptcy Court's dismissal order of April 29, 1997, the State Court proceedings, captioned Lloyd B. Fry v. Central West Virginia Development Corporation et

al., Circuit Court of Harrison County, West Virginia, Civil Action Number 95-C-408-2, had proceeded to a final order. Such final order provided that the real estate of the Corporation, which secured a deed of trust to Lloyd B. Fry, was to be conveyed back to the secured creditor.

At all times since 1992 during the State Court proceedings and the first Bankruptcy case, the Corporation was actively engaged in the development of the real estate, pledged to Mr. Fry, and in its efforts to develop the property from 1992 to 1997, the Corporation expended Four Hundred Seventeen Thousand Nine Hundred Twenty-Two Dollars and Eighty-Eight Cents ($412,922.88).

Faced with the loss of these expenditures, Central West Virginia Development Corporation filed its second Chapter 11 proceeding on July 3, 1997, before the United States Bankruptcy Court for the Northern District of West Virginia.

Prior to the filing on July 3, 1997, Central West Virginia Development Corporation was engaged in negotiations with Kennedy Funding Group and Bollaman Development to acquire the necessary funding to develop its property and pay off Mr. Fry.

Subsequent to the second filing by Central West Virginia Development Corporation, the Petitioner obeyed the Bankruptcy Code and appeared before the representative of the United States Trustee's Office for its 341 Hearing on August 15, 1997. At such hearing, the Corporation's officer and shareholder, Errol R. Kahoun, testified concerning the

re-organizational efforts. Upon hearing the testimony presented, the U.S. Trustee observed, "if the deal goes through . . . all creditors will be made whole, so you won't have to worry about anybody taking a bath or being paid prorata or anything like that."

It is important to note that neither the Respondent, Lloyd Fry, nor his legal representatives attended this hearing. Despite their failure to attend the 341 Hearing, on September 4, 1997, Mr. Fry and his attorneys filed a Motion to Dismiss the Corporation's second filing. The Motion to Dismiss merely recited the procedural history of the State Court litigation and the first Bankruptcy filing and this procedural history stopped at July 3, 1997, the date of the second filing. The motion did not set forth any facts subsequent to the second bankruptcy filing as a basis for their Motion to Dismiss.

Upon receipt of the Motion to Dismiss, the Bankruptcy Court orally set a hearing for September 25, 1997 at Clarksburg.

At the conclusion of the Hearing on September 25, 1997, the second filing of Central West Virginia Development Corporation was dismissed by an order entered October 2, 1997.

In denying the post-dismissal motions of the Petitioner, the Bankruptcy Court issued an Order on October 15, 1997 stating that at the Hearing on September 25, 1997, the Court made specific findings from the bench under *Carolin Corporation v. Miller*, 886 F. 2d 693 (4th Cir. 1989).

A review of the transcript of the September 25, 1997 Hearing before the Bankruptcy Court shows otherwise, to-wit:

A. In arriving at its decision to dismiss the case, the Bankruptcy Court did not consider any facts concerning the bankruptcy filing on July 3, 1997. Rather, the facts dealing with a prior filing of the Corporation, Case No. 96-10576, were the exclusive basis of dismissal.

B. The Bankruptcy Court did not give the Corporation meaningful notice of the Hearing on September 25, 1997 and refused to allow the Corporation to present any evidence at the Hearing on the Motion to Dismiss. Instead the Court said, without benefit of testimony, "so in terms of a bad faith filing, my premise is I've already dismissed this case."

C. Again, without citing any facts concerning the Corporation's present bankruptcy filing, the Court says: "And you all will be allowed your objections but that's it for Central."

D. At no time at the Dismissal Hearing, did the Bankruptcy Court cite even a scintilla of evidence concerning the Petitioner's second filing. Rather, the Bankruptcy Court said, "I consider this the same case we've had before. I've been through it."

REASONS FOR GRANTING THE WRIT

There is a conflict among the Circuits of the United States, concerning the dismissal of Chapter 11 Bankruptcy

filings for bad faith.

In some Circuits of the United States, subjective bad faith alone is sufficient to warrant the dismissal of a Chapter 11 proceeding. *In Re: Phoenix Piccadilly Ltd.*, 849 F. 2d 1393 (11th Cir. 1988).

In the Fourth Circuit, however, Bankruptcy Court can dismiss a Chapter 11 proceeding, the Bankruptcy Court is required to find subjective bad faith and objective futility. In exercising their duties under this two-prong test, "bankruptcy courts should make and report findings as to both futility and bad faith." *Carolin Corporation v. Miller* 886 F. 2d 693 (4th Cir. 1989).

In the *Carolin* decision the Bankruptcy Court conducted a "searching inquiry" of the current filing of the Bankruptcy Debtor and conducted a "series of hearings" producing "voluminous evidence" in support of the Bankruptcy Court's finding of bad faith filing and objective futility. *Carolin* 886 F. 2d at 701.

It is clear that the record in this case cannot and does not support the dismissal under the *Carolin* mandates.

As stated before, the Bankruptcy Court took no evidence whatsoever on the Corporation's present financial condition. The Bankruptcy Court did not take any evidence on the proposed re-organization and could therefore, not reasonably make any finding as to whether the Petitioner could ultimately emerge from Chapter 11 ready to carry on with viable business operations. The record does not

indicate that the Court considered, or even was aware, of the Petitioner's testimony offered at the Trustee's 341 Hearing, in
which the Trustee found that the creditors could be made whole.

Rather, we are left with a record, which discloses that the only consideration of the Bankruptcy Court was the Respondent's Motion to Dismiss. As the Petitioner has stressed before, such Motion merely recites facts, occurring prior to the second filing on July 3, 1997. The Respondent's Motion to Dismiss was not verified, and was not supported by Affidavits.

Additionally, 11 U.S.C. 1112 (B), provides that a Bankruptcy Court may dismiss a Chapter 11 proceeding upon "notice and hearing." 11 U.S.C. 102 A 1 provides only that notice and hearing shall be "as is appropriate in the particular circumstances." Clearly under the mandates of the *Carolin* decision, the actions of the Bankruptcy Court were not appropriate in this case.

All of which not only falls short of meeting the two-prong test of the *Carolin* decision, but does not rise to an acceptable level of fairness or due process of law to this Bankruptcy Debtor. A further example of the Bankruptcy Court's unfairness to this Petitioner was the Court's characterization of the second Chapter 11 filing as a "serial" filing. The mere filing of a second case cannot be fairly characterized as a "series of filings."

This is especially true when the Bankruptcy Court

did not invoke its general equitable authority or its statutory authority to deny Central West Virginia Development Corporation access to the Bankruptcy Court for a maximum of one hundred and eighty (180) days under 11 U.S.C. 109, 349, in its dismissal of the first Chapter 11 filing. Accordingly, when Central West Virginia Development Corporation filed its second Chapter 11 proceeding on July 3, 1997, the only impediment to the proceeding was the two-prong test under the *Carolin* decision.

In reviewing the actions of the Bankruptcy Court, the District Court was required to properly apply the two-prong test of the *Carolin* decision. However, the

District Court, just as the Bankruptcy Court, made only a finding of bad faith from the record. The District Court's decision made no effort whatsoever to properly apply the two-prong test of objective futility and subjective bad faith. In discussing the two-prong requirement of the *Carolin* case, this Court observed: "It is better to risk proceeding with a wrongly motivated invocation of Chapter 11 protections whose futility is not immediately manifest than to risk cutting off even a remote chance that a re-organization effort so motivated might nevertheless yield a successful rehabilitation." *Carolin* 886 F. 2d at 700.

Thus, the District Court, just as the Bankruptcy Court, did not apply the proper legal standard under the *Carolin* decision, to the dismissal of the Petitioner's appeal.

Additionally, the final order of the District Court was an alternative decision. First the District Court dismissed the appeal for mootness under the Motion to Dismiss. Then the

District Court went on to decide the appeal on the merits of the case.

Such a ruling by the District Court discloses a public policy basis for requiring courts to approach bad faith bankruptcy filings with heightened scrutiny. This public policy relating to bad faith cases is an argument for allowing this Court to ignore the mootness claim in this appeal and allow this appeal to be heard on the merits of the case, as was done by the District Court.

There is authority for appellate courts to reach the merits of a claim, which is technically moot, if the issue falls within the public interest exception of the mootness doctrine. 5 Am. Jur. 2d Appellate Review §648 (1995). Under the public interest exception, if the Court insists on applying the mootness doctrine the issue at hand may never be appropriately reviewed and will frustrate the appeal process on that particular issue. 5 Am. Jur. 2d Appellate Review §648 (1995).

The Fourth Circuit recognized this exception to the mootness doctrine in *Leonard v. Hammond* 804 F. 2d 838 (4th Cir. 1986). In that case, which is not a bankruptcy case, the court recognized two (2) exceptions to the mootness doctrine including one where there are issues involved which are capable of repetition yet which evade appellate review. In that case, the court decided to hear the appeal of certain indigents, who were no longer incarcerated and where the issues before the court were technically moot, because the court felt that it was likely the indigents would be held in civil contempt again without counsel if they failed to make

child support payments.

In West Virginia Education Association v. Consolidated Public Retirement Board 194 W. Va. 501, 460 S.E. 2d 747 (1995), the West Virginia Supreme Court set forth criteria for finding that an issue deserves judicial support even though the issue is technically moot. This sort of plea for appellate review where the mootness doctrine applies in both the bankruptcy and non-bankruptcy context will only be considered where 17

the issue at hand is one of important public interest. *West Virginia Education Association v. Consolidated Public Retirement Board,* 460 S.E. 2d at 757. In *Taylor v. Gill Street Investments*, 743 P. 2d 345 (Alaska 1987), for example, the court held that whether a landlord must strictly comply with notice time provisions of the state eviction statute fell within the public interest exception to the mootness doctrine. In *Lloyd v. Board of Supervisors of Elections*, 206 Md. 36, 111 A. 2d 379 (1954), the Maryland court established certain standards for deciding when, in those rare instances, courts can ignore the mootness doctrine, including instances where the public interest will clearly be hurt if the question is not immediately decided; where the matter involved is likely to recur frequently and it recurrence will involve a relationship between the government and its citizens; or where a duty of government is at stake and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely to prevent a decision.

In this appeal the "capable of repetition, yet evading review" exception applies. Petitioner sought stays from the Bankruptcy Court, District Court and Circuit Court, all of

which were denied. If the transfer of the Petitioner's asset mooted this appeal, the Petitioner has no remedy to address the improper application of the Carolin decision by the Bankruptcy Court and District Court. All of which results in a taking of the Petitioner's property without due process of law in violation of the Fifth Amendment.

As the Petitioner asserted in its Petition for Rehearing, it is critical for bankruptcy debtors to have a meaningful appeal from Bankruptcy Court rulings. This is particularly true when the debtor believes, as in this case, that the actions of the Bankruptcy Court were arbitrary, capricious and clearly wrong.

It is clear that bad faith dismissals will continue in the Circuit Courts of the United States and if a stay is not granted, these appeals will be mooted and Bankruptcy debtors will not have an opportunity to appeal on the merits of their cases, resulting in due process violations.

The fact that the Fourth Circuit Court of Appeals requires both subjective and objective evidence of bad faith in bankruptcy matters together with the general objectives of the bankruptcy code, which are to provide debtors with a fresh start and generally review issues in a light favorable to the debtor, provided a compelling argument for an exception to the mootness doctrine.

The Fourth Circuit Court of Appeals, however, did not ever address the exceptions to the mootness doctrine set forth by the Petitioner, rendering their own Carolin decision a meaningless and unenforceable standard.

To prevent this manifest injustice, this Writ should be granted to establish a Fifth Amendment claim for Bankruptcy debtors.

19

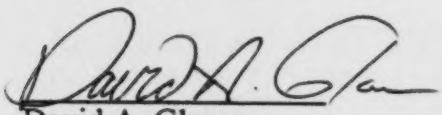
In the case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), this Court recognized that federal courts can provide remedies for violations of a constitutional right. While that case dealt with Fourth Amendment rights, the necessity and appropriateness of judicial relief is no less compelling in this case then it was in Bivens.

Your Petitioner has lost its real estate holdings valued in excess of a million dollars, not because of the merits of its appeal, but due to the appellate doctrine of mootness. Your Petitioner has lost his property without an opportunity for a meaningful appeal of the actions of the Bankruptcy Court. All of which deprives the Petitioner of its property without due process of law.

CONCLUSION

For the above reasons a writ of certiorari should be issued to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,



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Date: 1-21-00

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1443

In Re: CENTRAL WEST VIRGINIA DEVELOPMENT CORPORATION,

Petitioner,

CENTRAL WEST VIRGINIA DEVELOPMENT CORPORATION,

Plaintiff - Appellant,

Versus

LLOYD B. FRY,

And

UNITED STATES TRUSTEE; ERROL R. KOHOUN; PAMELA L. KAHOUN,

Parties in Interest.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. Robert Earl Maxwell, Senior District Judge. (CA-97-181-1, BK-97-11776)

Submitted: October 21, 1999
Decided: October 26, 1999

PER CURIAM:

Central West Virginia Development Corporation (CWVDC) appeals from the district court's order dismissing as moot its appeal from the bankruptcy court's order dismissing its petition under Chapter 11 of the bankruptcy code. Because the sole asset owned by CWVDC has been transferred to Fry and CWVDC has failed to obtain a stay pending appeal, we grant Fry's motion to dismiss the appeal as moot. See 11 U.S.C § 363 (m) (1994); Willemain v. Kivitz, 764 F. 2d 1019, 1021-24 (4th Cir. 1985) (holding that sale of property to secured creditor while appeal was pending rendered appeal moot); see also In re Stadium Management Corp. 895 F. 2d 845, 847 (1st Cir. 1990) ("absent a stay, the

court must dismiss a pending appeal as moot because the court has no remedy that it can fashion even if it would have determined the issues differently."). We deny CWVDC's motion to strike Fry's

motion to dismiss the appeal and grant Fry's motion to dismiss the appeal and grant Fry's motion to dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

DISMISSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:

Central West Virginia
Development Corporation,

Debtor.

CIVIL ACTION NO. 1:97CV181
BANKRUPTCY NO. 97-11776
(Maxwell)

ORDER

Upon careful consideration of the appellee's Motion to Dismiss, filed January 13, 1996 and having heard no objection thereto by appellant, it is

ORDERED that the appellee's Motion to Dismiss be, and the same is hereby **GRANTED.**

In the alternative, considering the briefs and arguments of the parties on the merits, the Court finds that the appeal is not well taken. As noted by the Court during the October 23, 1997 hearing, the Bankruptcy Court had ample evidence before it to determine that the second Chapter 11 petition was filed in bad faith, and it is apparent that the debtor attempted to use the bankruptcy court to

circumvent the final judgment of the Circuit Court of Harrison County. Accordingly, it is

ORDERED that the October 2, 1997, and October 15, 1997 orders of the Bankruptcy Court be, and the same are hereby, **AFFIRMED**, and that this appeal be **DISMISSED** and **STRICKEN** from the docket of the Court. It is further

ORDERED that, in accordance with Bankruptcy Rule 8016(b), the Clerk of the Court shall send a certified copy of this Order to all parties of record and to the Clerk of the Bankruptcy Court.

ENTER: February 20th, 1998

"s/Robert E. Maxwell"
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:

CENTRAL WEST VIRGINIA
DEVELOPMENT CORPORATION

Debtor(s).

BK NO 97-11776

ORDER DENYING MOTION TO ALTER OF AMEND JUDGMENT AND MOTION FOR STAY

The Court's factual findings and conclusions were placed on the record at the hearing held on September 25, 1997. At the time the Court made specific findings from the bench in accordance with the guidelines established by the Fourth Circuit case of Carolin Corporation v. Miller, 886 F. 2d (4th Cir. 1989).

The Court was further presented with an order of the Circuit Court of Harrison County, West Virginia, wherein the state court ordered the enforcement of a settlement agreement which would effectively remove the property from the bankruptcy estate. In the interests of comity, this Court declined to continue to exercise jurisdiction over the subject property as that would effectively overrule the state

court order which should be accomplished by appeal, not the filing a bankruptcy petition.

Inasmuch as the sale of the real estate has been mandated by the state court, this Court will not grant a stay. Accordingly, it is hereby

ORDERED that the Motion to Alter or Amend Judgment and the Motion for Stay Pending Appeal are **DENIED.**

The Clerk is directed to transmit copies of this Order to all creditors and parties in interest.

DATED: 10/15/97

"s/ L. Edward Friend II"
U. S. BANKRUPTCY
JUDGE.

(2)

No. 99-1242

Supreme Court, U.S.
FILED
FEB 25 2000
CLERK

In The

Supreme Court of the United States

CENTRAL WEST VIRGINIA DEVELOPMENT CORPORATION,

Petitioner,

v.

LLOYD B. FRY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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34pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit properly dismissed the Petitioner's appeal on the basis that such appeal had become moot.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Jurisdiction 1

Statement of Case 2

Statement of Facts 3

Summary of Argument 12

Argument 13

Conclusion 28

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 101 S.Ct. 441, 449 U.S. 90, 66 L.Ed. 2d 308 (1980) 28

Bowers v. Connecticut National Bank, 78 B.R. 388 (D. Conn. 1987) 28

Carolin Corp. v. Miller, 886 F.2d 693 (4th Cir. 1989) ..*passim*

Credit Alliance Corp. v. Penn Hook Coal Company, 77 B.R. 57 (W.D. Va. 1987), affd. 851 F.2d 119 (4th Cir. 1988) 27

Greylock Glen Corp. v. Community Savings Bank, 656 F.2d 1 (1st Cir. 1981) 14

Gwinnett Bank & Trust Company v. Matos, 790 F.2d 864 (11th Cir. 1986) 16

In re Chesmid Park Corporation, 45 B.R. 153 (E.D. Va. 1984) 22

In re Farrell, 27 B.R. 241 (Bky. Ct. E.D. N.Y. 1992) 27

In re First Actuarial Corp. of Illinois, 182 B.R. 178 (Bky. Ct. W.D. Mich. 1995) 28

In re Highway Truck Drivers and Helpers Local Union Number 107, 888 F.2d 293 (3rd Cir. 1989) 15, 27

In re Manges, 29 F.3d 1034 (5th Cir. 1994), cert. denied, 115 S.Ct. 1105 (1995) 14

In re Morton, 43 B.R. 215 (Bky. Ct. E.D. N.Y. 1984) 27

In re Randy Homes Corp., 86 B.R. 259 (M.D. Fla. 1988) 22

In re Sewanee Land, Coal & Cattle, Inc., 735 F.2d 1294 (11th Cir. 1984) 14, 16

TABLE OF AUTHORITIES – Continued

Page

In re Stadium Management Corp., 895 F.2d 845 (1st Cir. 1990) 14

In re Trident Associates, 52 F.3d 127 (6th Cir. 1995) 22

In re Walter, 108 B.R. 244 (C.D. Cal. 1989) 22

Kitces v. Wood, 917 F.Supp. 338 (D.N.J. 1996) 28

Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986) 16

Miami Center Ltd. Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir. 1988) 17

Taylor v. Gill Street Investments, 743 P.2d 345 (Alaska 1987) 16

W.S. Frey Company v. Precipitation Associates of America, Inc., 899 F.Supp. 1527 (W.D. Va. 1995) 28

Willemain v. Kibitz, 764 F.2d 1018 (4th Cir. 1985) 12, 14

STATUTES

11 U.S.C. § 1112(b) 19, 26

11 U.S.C. § 1112(b)(1), (2), and (3) 19

11 U.S.C. § 362 5

28 U.S.C. § 1738 27

JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for certiorari only for compelling reasons. According to Rule 10, compelling reasons can be found, among other things, if the decision leading to the petition: contributes to a conflict of authority between the courts of appeal and/or state courts of last resort; reflects a departure from the usual course of judicial proceedings; or presents an important question of federal law that has not been but should be settled by this Court.

Petitioner has not set forth any basis under Rule 10 to justify the exercise of this Court's discretionary jurisdiction. Petitioner does not and cannot contend that the decisions in the lower courts have created a split of authority among the federal courts or between the federal and state courts. Nor can Petitioner assert that a state court has decided an important federal question that should be addressed by this Supreme Court. Perhaps Petitioner believes that the decision of the Fourth Circuit Court of Appeals upon which its Petition for Writ of Certiorari is based has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. However, if this is Petitioner's basis for its Petition for Writ of Certiorari it has neither been expressed in its brief nor adequately supported by any argument contained in its brief.

STATEMENT OF CASE

This case involves an appeal initially filed by Central West Virginia Development Corporation (hereinafter "CWVD") from a decision issued by the United States Bankruptcy Court for the Northern District of West Virginia (the "Bankruptcy Court") in which the Court dismissed the Chapter 11 petition in bankruptcy filed by CWVD. The Bankruptcy Court's decision was issued only after CWVD engaged in an extensive history of dilatory tactics over a four-year period to prevent and delay the Respondent, Lloyd Fry (hereinafter "Fry"), from enforcing his rights as the sole secured creditor of CWVD.

In 1992, Fry loaned money to CWVD in order to enable the company to acquire real estate located in Harrison County, West Virginia. CWVD intended to resell the property to prospective developers but was unable to do so and subsequently defaulted on its loans to Fry. After a long series of state court proceedings (reaching to the Supreme Court of Appeals of West Virginia) and two bankruptcy filings, the Bankruptcy Court issued an order dismissing the second of CWVD's bankruptcy petitions. CWVD filed an appeal of the Bankruptcy Court's decision to the United States District Court for the Northern District of West Virginia (the "District Court"). The District Court dismissed the appeal both on the merits and on the basis that the appeal had become moot. CWVD further appealed to the United States Fourth Circuit Court of Appeals which likewise dismissed the appeal on the basis that the appeal had become moot. This matter is now before this Supreme Court on CWVD's Petition for Writ of Certiorari.

STATEMENT OF FACTS

CWVD was formed in 1992 for the sole purpose of acquiring and developing certain real estate in Harrison County, West Virginia (the "Premises"). The company did not have the finances necessary to acquire the Premises so, in 1992, two of the principal shareholders (Errol Kahoun and Jerry Berardi) arranged to borrow the necessary funds from the Respondent, Lloyd Fry. The loan was evidenced by promissory notes which were secured by a Deed of Trust executed by CWVD and were further guaranteed by the shareholders of CWVD.

CWVD failed to make payments as they became due under the promissory notes and became in default on November 18, 1993. However, Fry cooperated with CWVD throughout 1994 and the first half of 1995 based on numerous representations made by CWVD indicating that efforts were being made to either sell the Premises or obtain alternative financing to satisfy the obligations owed to Fry.

Although Mr. Fry was originally willing to cooperate with CWVD in order to permit it to consummate a deal with a prospective purchaser, it became increasingly clear that the efforts of CWVD would not be successful. Consequently, on August 14, 1995, after nearly three years of fruitless efforts by CWVD to locate a purchaser for the Premises and nearly two years after the promissory notes became due, Fry initiated foreclosure proceedings in the Circuit Court of Harrison County, West Virginia (the "State Court").

A foreclosure sale was scheduled for September 1, 1995, however, subsequent to the initiation of the foreclosure proceedings CWVD represented that it had obtained a buyer for the Premises and requested that the foreclosure proceedings be postponed. Fry agreed, however, CWVD could not make arrangements to complete the sale.

Shortly thereafter, CWVD retained new counsel and, at the request of its new attorney, Fry acquiesced in a continuance of a second foreclosure sale which had been scheduled for October 2, 1995. The purpose of the continuance was, once again, to enable CWVD to pursue other leads with respect to the sale of the Premises. However, CWVD's efforts continued to be unsuccessful.

Having failed for over three years to arrange for the sale of the Premises and having completely exhausted the patience of Fry after several additional continuances of the foreclosure sale, CWVD sought relief by filing a Chapter 11 Petition in Bankruptcy on April 12, 1996 in the United States Bankruptcy Court for the Northern District of West Virginia. The bankruptcy petition was filed only three days before a foreclosure sale which had been rescheduled on at least four previous occasions at the request of CWVD and its shareholders.

Since CWVD had virtually no secured creditors other than Fry and virtually no assets other than the Premises which were subject to Fry's Deed of Trust, it was obvious that CWVD's sole purpose in filing the bankruptcy petition was to delay and hinder the efforts of Fry to foreclose on the Premises.

Although the Automatic Stay imposed pursuant to 11 U.S.C. § 362 prevented further proceedings against CWVD, Fry decided to proceed against the individual shareholder guarantors in the State Court. In the course of preparing for the State Court trial (which was scheduled for June 17, 1996), Fry engaged in intensive negotiations with the shareholders in a good faith effort to reach a settlement which would resolve all issues pending between the parties. Negotiations were conducted between the parties which resulted in a comprehensive settlement agreement being reached on Saturday, June 15, 1996. The settlement agreement provided, inter alia, that the shareholders would arrange for the voluntary dismissal of the Chapter 11 bankruptcy proceeding filed by CWVD and the transfer of the Premises to Fry. The State Court was promptly advised of the settlement and the jury trial was cancelled.

The settlement agreement was subsequently reduced to writing and circulated among the parties for signature. However, the shareholders refused to sign the agreement, either on their own behalf or on behalf of CWVD.

Following the refusal of the shareholders to sign the settlement agreement, Fry filed a "Motion to Enforce Settlement Agreement" in the State Court. A hearing on the Motion to Enforce Settlement Agreement was conducted and on October 31, 1996, the State Court issued an Order granting Fry's Motion in which the Court made numerous findings of fact and conclusions of law, including the following:

> The Court finds that the defendant, Jerry A. Berardi [the principal shareholder] has wilfully and intentionally manipulated the settlement

> process in order to avoid the trial date previously scheduled in this matter and finds that sanctions are appropriate.

Despite the State Court Order, the shareholders refused to comply with the terms of the Settlement Agreement, refused to cause the Premises to be transferred to Fry, and refused to cause the bankruptcy petition which was filed on April 12, 1996 to be dismissed.

Instead, the shareholders filed an appeal of the State Court Order to the Supreme Court of Appeals of West Virginia and, in addition, sought the approval of the Bankruptcy Court for the employment of an auctioneer to sell the Premises at a public auction.

Although Fry was entitled to receive title to the Premises pursuant to the Settlement Agreement and the State Court Order, Fry did not object to the request of CWVD to hold a public auction. After all, this was precisely what Fry had been attempting to do for over a year since he first filed suit in the West Virginia State Court.

With the consent of Fry, the Bankruptcy Court approved the motion of CWVD for the appointment of an auctioneer and entered an "Order Authorizing Sale of Property." The Order required CWVD to sell the Premises at a public auction and also ordered CWVD to employ an auctioneer. In addition, the Bankruptcy Court ordered that: "In the event that the Premises are not sold on the date of the auction, this Chapter 11 proceeding shall be dismissed by the Court." CWVD consented to and approved the Order.

Remarkably, although it was CWVD that sought the order of the Bankruptcy Court to employ an auctioneer,

once the Order was issued, CWVD simply refused to comply with the Bankruptcy Court's instruction to conduct the auction. Despite persistent efforts by both counsel for Fry and the auctioneer to finalize arrangements for the auction, CWVD simply refused to cooperate. Consequently, the auction ordered by the Bankruptcy Court for March 26, 1997 was not conducted.

Following the refusal of CWVD to conduct the auction, the first Chapter 11 case of CWVD was dismissed on May 2, 1997. The dismissal came over a year after the petition was filed. During that entire one year period, CWVD never filed any disclosure statement, never prepared a plan of reorganization, and never prepared any other document indicating an ability or intention to successfully reorganize.

Shortly thereafter, on June 25, 1997, the Supreme Court of Appeals of West Virginia declined to accept the appeal petition filed by CWVD. Consequently, the State Court Order enforcing the Settlement Agreement between Fry and the shareholders of CWVD and ordering the shareholders to transfer the Premises to Fry became a final and binding Order of the State of West Virginia.

At long last, over 3-1/2 years after the promissory notes became due and following years of litigation and delays (including no less than five foreclosure sale dates which were scheduled and then cancelled), Lloyd Fry was finally entitled to recover the Premises which were subject to his Deed of Trust. CWVD, however, had other plans. On July 3, 1997, CWVD filed a second bankruptcy petition. The second bankruptcy petition was filed a mere eight days after the Supreme Court of Appeals upheld the

Order of the State Court providing for the transfer of the Premises to Fry and only two months after the Bankruptcy Court dismissed CWVD's first Chapter 11 case.

Once again, the sole asset listed by CWVD in the second bankruptcy case was the real estate which CWVD was to transfer to Fry and the sole creditor listed in the case was Fry. Furthermore, the bankruptcy petition of CWVD clearly illustrated that it had no viable business entity to reorganize which would entitle CWVD to protection under the Bankruptcy Code. Most telling, CWVD's monthly income and expenditures report which was filed with the bankruptcy petition showed virtually no income and virtually no expenditures for the Company.

Shortly after CWVD filed its second bankruptcy petition, Fry filed a Motion to Dismiss the petition. The Bankruptcy Court subsequently conducted a hearing on Fry's Motion and, finding good cause for dismissal, entered an Order accordingly.

CWVD filed an appeal of the Bankruptcy Court's decision and requested the Bankruptcy Court to amend its judgment and issue a stay pending appeal.

On October 15, 1997, the Bankruptcy Court denied the Debtor's motion to amend the judgment in an Order which stated that: "At the time [of the hearing], the Court made specific findings from the bench in accordance with the guidelines established by the Fourth Circuit case of *Carolin Corp. v. Miller,* 886 F.2d 693 (4th Cir. 1989)." The Bankruptcy Court further stated that the final decision of the State Court would effectively remove the property of CWVD from the bankruptcy estate and the Bankruptcy

Court therefore declined to " . . . overrule the state court order which should be accomplished by appeal, not the filing of a bankruptcy petition."[1] In addition, the Bankruptcy Court denied the motion of CWVD for a stay pending appeal.

CWVD then filed a Motion for Stay of Judgment with the District Court. On October 23, 1997, the District Court, conducted a hearing on CWVD's Motion for Stay of Judgment. In his opening remarks, District Court Judge Maxwell stated that:

> Now, in preparation for this hearing, the Court has carefully studied the Fry Motion for Dismissal, the debtor's Plan to pay Creditors, the debtor's response to the Motion for Dismissal, the transcript of the September 25, 1997 hearing in Bankruptcy Court, Judge Friend's dismissal order, the debtor's post-dismissal motions, Judge Friend's order denying the debtor's post-dismissal orders, the debtor's designation of the record and statement of issues on appeal, and the debtor's instant motion for stay of judgment.

District Court Judge Maxwell also stated that:

> It is also significant and important to note and recognize, that the Debtor filed its first Chapter 11 petition on April 12, 1996, but that it was dismissed on May 2, 1997, when the debtor failed to proceed with a public auction which

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[1] Of course, CWVD had already attempted to appeal the State Court Order to the Supreme Court of Appeals of West Virginia. That petition for appeal was denied.

> had been agreed to by creditor Fry and approved by the Bankruptcy Court.

Following testimony given by Jerry Berardi [CWVD's principal shareholder] and examination of Mr. Berardi by Judge Maxwell, the Court concluded:

> Upon careful consideration of all matters that are of record before the Court, this Court cannot, in good conscience or in keeping with the principles of law that have been expressed by the statutes, the rules and the court decisions that are applicable here, grant the debtor's Motion for Stay of Judgment. *The Bankruptcy Court had ample evidence before it to determine that the second Chapter 11 petition was filed in bad faith.* (Emphasis Added).
>
> It is apparent from the record that is before this Court that the debtor is attempting to use the bankruptcy court and the Chapter 11 proceedings, to circumvent the final judgment of the Circuit Court of Harrison County, West Virginia, which in effect has been upheld by the denial of the appeal of that judgment order by the West Virginia Supreme Court of Appeals.

The District Court then proceeded to issue an order denying CWVD's Motion for Stay of Judgment.

CWVD filed an appeal with the Fourth Circuit Court of Appeals and, again, requested an Order of Stay. The request for a stay pending appeal was denied by the Fourth Circuit.

After the Fourth Circuit Court denied the request of CWVD for a stay, the State Court authorized the appointment of a special commissioner to transfer the Premises to Fry in accordance with its previous orders. A Special

Commissioner's Deed was executed and filed for record with the Clerk of the County Commission of Harrison County, West Virginia on October 28, 1997. Consequently, the Premises are no longer an asset of CWVD and have not been for over two years.

As a result of the transfer of the Premises by a Special Commissioner's Deed to Fry, and since the property was the sole asset of CWVD, the issues presented by CWVD in its appeals have become moot.[2] Consequently, on January 13, 1998, Fry filed a Motion to Dismiss the District Court appeal as moot. CWVD failed to respond or object to Fry's Motion to Dismiss. On February 20, 1998 the District Court granted Fry's Motion to Dismiss in an Order which stated that:

> Upon careful consideration of the Appellee's Motion to Dismiss, filed January 13, 1998, and having heard no objection thereto by appellant, it is ORDERED that the Appellee's Motion to Dismiss be, and the same is hereby, GRANTED.

The District Court Order also provided that:

> In the alternative, considering the briefs and arguments of the parties on the merits, the Court finds that the appeal is not well taken. As noted by the Court during the October 23, 1997 hearing, the Bankruptcy Court had ample evidence before it to determine that the second

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[2] In fact, CWVD and its counsel specifically acknowledged this consequence at a hearing conducted by the District Court on October 23, 1997 in which counsel for CWVD acknowledged that if a stay pending appeal was not granted to prevent transfer of the Premises that: " . . . indeed, this appeal would be more than likely dismissed as being moot."

> Chapter 11 petition was filed in bad faith, and it is apparent that the debtor attempted to use the bankruptcy court to circumvent the final judgment of the Circuit Court of Harrison County. Accordingly, it is ORDERED that the October 2, 1997 and October 15, 1997 Orders of the Bankruptcy Court be, and the same are hereby, AFFIRMED, and that this appeal be DISMISSED and STRICKEN from the docket of the Court.

CWVD filed a Petition For Rehearing with the District Court on March 2, 1998 which was denied. CWVD then filed its Notice of Appeal with the Fourth Circuit Court. Fry filed his Brief in Opposition together with a Motion to Dismiss on the basis that the appeal had become moot. On October 26, 1999, the Fourth Circuit Court of Appeals granted Fry's Motion to Dismiss.

SUMMARY OF ARGUMENT

The appeal filed by CWVD has become moot based on the fact that the sole asset of CWVD has been transferred to Fry pursuant to a Special Commissioner's Deed issued in accordance with final and binding state court orders. This principal is supported by an overwhelming weight of authority including a decision by the Fourth Circuit Court of Appeals in *Willemain v. Kibitz*, 764 F.2d 1018, 1023 (4th Cir. 1985) (Appeal moot because of failure to obtain stay pending appeal of an approved sale of property). Motions for a stay pending appeal filed by CWVD were denied by the Bankruptcy Court, the Federal District Court and the Fourth Circuit Court of Appeals. The "public interest" exception to the mootness doctrine

which is asserted by CWVD is not applicable to the case at bar. Nor does the Fifth Amendment due process claim, asserted by CWVD for the first time in its Petition for Writ of Certiorari, apply to the case at bar.

ARGUMENT

A. The Appeal Filed By CWVD Has Become Moot Based On The Fact That The Sole Asset of CWVD Has Been Transferred Pursuant To Final And Binding State Court Orders.

At the time Fry originally filed his appellate brief with the District Court, he also filed a Motion to Dismiss the appeal on the basis that the appeal had been rendered moot. The District Court agreed and issued an Order which granted Fry's Motion to Dismiss. In arguing that the District Court erred in dismissing the bankruptcy appeal as moot, the appellate brief filed by CWVD in the Fourth Circuit Court of Appeals asserted a "public interest" exception to the mootness doctrine, an argument which had not been presented to the District Court. This argument was rejected by the Fourth Circuit when it also dismissed the Petitioner's appeal as moot. CWVD now reasserts this "public interest exception of the mootness doctrine" as well as another new argument that the Petitioner has been deprived of its property without due process of law.

Before further analyzing CVWD's argument, it is appropriate to set forth the legal basis upon which the District Court and the Fourth Circuit Court dismissed the Petitioner's appeals as moot.

After CWVD filed an appeal of the Bankruptcy Court Order, CWVD also filed a Motion for a Stay Pending Appeal. The Motion for a Stay was denied by the Bankruptcy Court. The District Court, likewise, denied CWVD's request for a stay pending appeal as did the Fourth Circuit Court of Appeals. Consequently, Fry requested and the State Court ordered the appointment of a special commissioner to transfer the Premises to Fry pursuant to the order which had previously been issued in the Harrison County Circuit Court. As a result of the transfer of the real estate, CWVD no longer owns the Premises nor any other assets upon which to base a plan of reorganization and therefore the appeals filed by CWVD have become moot.

This principle is supported by an overwhelming weight of authority. See *Willemain v. Kibitz*, 764 F.2d 1018, 1023 (4th Cir. 1985) (Appeal moot because of failure to obtain stay pending appeal of approved sale of property); *In re Stadium Management Corp.*, 895 F.2d 845, 847 (1st Cir. 1990) (If creditor fails to obtain a stay of a sale to a purchaser, and an order confirming the sale is entered, the sale becomes final, and cannot be reversed on appeal); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984) (Failure to obtain stay pending appeal rendered appeal moot where creditors foreclosed); *Greylock Glen Corp. v. Community Savings Bank*, 656 F.2d 1 (1st Cir. 1981) (Appeal from order lifting automatic stay dismissed as moot when, because no stay was issued, secured party foreclosed); *In re Manges*, 29 F.3d 1034 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1105 (1995) (The failure to obtain a stay is the same as a failure to even seek a stay and the risk is present that appellate review may be

precluded on grounds of mootness); *In re Highway Truck Drivers and Helpers,* 888 F.2d 293 (3rd Cir. 1989) (An appeal will be dismissed as moot when events occur during the pendency of the appeal which prevent the appellate court from granting any effective relief. A valid state court judgment is such an event and cannot be enjoined by a federal court upon grounds that would not be available in the state court. A creditor's failure to obtain a stay of an order granting relief from an automatic stay can render the appeal of such an order moot because the state court judgment should be afforded full faith and credit).

In contrast to the overwhelming weight of authority set forth above, CWVD has failed to cite (either in its Fourth Circuit Appellate Brief or in its Petition for Writ of Certiorari to this Supreme Court) even a single case that is contrary to or distinguishes any of the foregoing cases. Instead, CWVD relies upon a theory which it has acknowledged applies only in "rare instances." CWVD suggests that this is one of a unique brand of cases where public policy should overrule an otherwise fundamental principle of law.[3] However, the "public interest" principle asserted by CWVD is simply not applicable to the case at bar since there is no "public" interest involved in this case. The case at bar involves the purely private concern of an individual debtor which is attempting to maintain

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[3] That the mootness doctrine is such a fundamental principle of law is beyond debate. It is also beyond debate that this rule of law has been applied in numerous cases, such as the case at bar, involving the transfer of real estate. (See above citations).

ownership of private real estate at the expense of a secured creditor.

In contrast to the case at bar, the cases cited by CWVD involve broad classes of potentially helpless individuals, such as indigents facing incarceration (*Leonard v. Hammond*, 804 F.2d 838 (4th Cir. 1986)) and tenants facing eviction (*Taylor v. Gill Street Investments*, 743 P.2d 345 (Alaska 1987)). Clearly these citations have no relevance whatsoever to the case now before this Court.

Furthermore, the protection which CWVD seeks, that is, the prevention of an involuntary disposition of its property, is already available under the law. A debtor which has suffered an adverse ruling may, as CWVD has done in this case, request a stay pending appeal. If such a debtor meets the standard necessary to obtain such a stay, then it will be able to prevent any threatened disposition of its property. This, however, is the only manner which the law provides to protect a debtor against the involuntary disposition of its assets. See *Gwinnett Bank & Trust Company v. Matos*, 790 F.2d 864 (11th Cir. 1986) (an appeal was moot where the debtors failed to post bond necessary to obtain a stay of judgment and in the interim the creditor instituted foreclosure proceedings and acquired the property); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1296 (11th Cir. 1984) (Failure of bankruptcy debtor to obtain stay pending appeal of bankruptcy court decision which permits a creditor to commence foreclosure and sale proceedings, with result that property was acquired by secured creditor left the Court of Appeals powerless to grant relief, even though the creditors which acquired the property were parties to the appeal; therefore, appeal would be dismissed as moot);

Miami Center Ltd. Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir. 1988) (absent a stay pending appeal, the appeal is moot if there is a transfer of the property, whether the party which acquires the property is the mortgage holder or not).

In the case at bar, CWVD sought a stay pending appeal which was denied not only by the Bankruptcy Court but by the District Court as well as the Fourth Circuit Court of Appeals. In fact, the natural consequence of the failure of CWVD to satisfy the requirements necessary to obtain a stay pending appeal was recognized by CWVD's own counsel in the hearing conducted by the District Court on October 23, 1997 when he stated that if the stay was not granted to prevent transfer of the Premises that: " . . . indeed, this appeal would be more than likely dismissed as being moot."

Based on the overwhelming weight of authority in cases which deal with the transfer of property and a complete lack of any authority to the contrary, it is clear that by virtue of the transfer of the property to Fry the appeal rights of CWVD have become moot.

Furthermore, CWVD has failed to cite even a single case to support its conclusory assertion that the dismissal of its appeal by the Fourth Circuit "results in a taking of the Petitioner's property without due process of law in violation of the Fifth Amendment". Sprinkling vague references to phrases such as "due process violations" and "violation of the Fifth Amendment" throughout Petitioner's Brief without providing even the slightest support in constitutional law clearly does not raise a compelling reason for this Court to exercise its judicial

discretion under Rule 10 of the Rules of this Court. It appears obvious that the reason the Petitioner has not cited even a single case in support of its suggestion that its Fifth Amendment rights have been violated is because no such case in support exists.

B. The Order Of Dismissal Originally Issued By the Bankruptcy Court Is Fully Supported By The Facts And Procedural History Of This Case And Is Consistent With The Authority Granted To The Bankruptcy Court Pursuant To 11 U.S.C. § 1112(b) And Applicable Case Law.

Although the sole issue before this Supreme Court involves the dismissal of CWVD's appeal on the basis that the appeal has become moot, the Petitioner spends a considerable portion of its brief criticizing the original decision of the Bankruptcy Court in dismissing its second bankruptcy. While the basis for the dismissal was addressed and decided in Respondents favor by both the Bankruptcy Court and the District Court, those issues were not reviewed nor was it necessary that they be reviewed when the Fourth Circuit Court dismissed CWVD's appeal as moot.

However, in order to eliminate any misunderstanding regarding the basis for the Bankruptcy Court's original decision and to address the connection which the Petitioner has tried to make between the Bankruptcy Court's dismissal and the issue of mootness, Respondent offers the following analysis of the Bankruptcy Court's decision.

The authority of a Bankruptcy Court to dismiss a Chapter 11 bankruptcy case for cause is set forth in 11 U.S.C. § 1112(b), which provides in pertinent part:

> [O]n request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under Chapter 7 of this title or *may dismiss a case under this chapter*, whichever is in the best interest of creditors and the estate, *for cause* . . . (Emphasis added).

Some of the factors listed in § 1112(b) which may be considered in determining whether dismissal is appropriate include the "absence of a reasonable likelihood of rehabilitation", the "inability to effectuate a plan", and "unreasonable delay by the debtor that is prejudicial to creditors". 11 U.S.C. § 1112(b)(1), (2), and (3).

In addition to these specific provisions of the Bankruptcy Code, the Fourth Circuit Court of Appeals has also recognized that an additional basis for a dismissal of a Chapter 11 Petition can be made upon a finding that the Debtor filed such petition in "bad faith". With respect to the bad faith aspect of this appeal, both Fry and CWVD have acknowledged the applicability of *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989).

In *Carolin Corp.*, based upon facts strikingly similar to those in the case at bar, the Fourth Circuit Court of Appeals held that a bankruptcy court may dismiss a Chapter 11 Petition "for want of good faith in its filing". *Carolin Corp.* at 694.

The debtor in *Carolin Corp.* was a real estate holding company which held a single parcel of real estate as its principal asset. The real estate was subject to a deed of trust which was held by the sole secured creditor of *Carolin Corp.* Upon default by the debtor, the secured creditor scheduled a foreclosure sale which was stayed when the debtor filed for Chapter 11 protection on the day of the sale. *Carolin Corp.* at 695. The secured creditor promptly filed an action to dismiss the bankruptcy petition which was granted by the Bankruptcy Court, affirmed by the District Court and appealed to the Fourth Circuit Court of Appeals.

In *Carolin Corp.*, the Fourth Circuit Court determined that in order to dismiss a bankruptcy petition for want of good faith it is necessary to show an objective futility of any possible reorganization and subjective bad faith on the part of the debtor. The Court then affirmed the Bankruptcy Court's decision to dismiss the debtor's petition after it considered the following factors:

(1) The debtor had only one employee.

(2) The debtor had no significant assets apart from the single tract of real estate.

(3) The debtor had no unsecured creditors with substantial claims which would have suggested that the debtor had ongoing business relationships.

(4) The debtor filed the bankruptcy petition immediately prior to the scheduled foreclosure sale.

(5) The debtor continually refused to make adequate provisions for the preservation of the secured creditor's rights.

Id. at 702-705.

Based on these facts, the Court held that there was little, if any, evidence to suggest that the debtor showed significant potential to ultimately emerge from the Chapter 11 proceedings in a rehabilitated condition such that it would be able to carry on with viable business operations. *Id.* at 702.

In *Carolin Corp.*, the Fourth Circuit observed that:

> [B]ad faith is shown if the purpose of a Chapter 11 debtor is to hold a single asset "hostage" in order to speculate that such asset may increase in value [leading] to recover[y of the] original investment at the creditor's risk.
>
> *Id.* at 705.

The facts in this case are strikingly similar to those contained in the *Carolin Corp.* case. CWVD is a real estate holding company which has a single tract of real estate as its principal asset. Fry is the only secured creditor of CWVD. CWVD filed its initial Chapter 11 bankruptcy petition shortly before the scheduled foreclosure sale. CWVD's bankruptcy petition shows that it has no assets apart from the single tract of real estate, and no unsecured creditors with substantial claims which would suggest that CWVD had ongoing business relationships. CWVD continually refused throughout its initial Chapter 11 bankruptcy proceedings and the State Court proceedings to make adequate provisions for the preservation of Fry's rights as evidenced by its failure to honor the terms of the Settlement Agreement and by CWVD's failure to comply with the Order to conduct an auction sale of the Premises issued by the Bankruptcy Court in CWVD's initial Chapter 11 proceeding.

Numerous other courts have also held that the dismissal of a bankruptcy petition filed in bad faith was appropriate in cases involving facts substantially similar to those contained in the *Carolin Corp.* case and the CWVD case at bar. See *In re Chesmid Park Corporation*, 45 B.R. 153 (E.D. Va. 1984) (debtor's filing of its bankruptcy petition on eve of foreclosure sale of its sole asset, a tract of undeveloped commercial property, after four years of repeated delay and continued delinquencies in payment was sufficient in conjunction with other factors present in the case to warrant dismissal on the ground of bad faith); *In re Walter*, 108 B.R. 244 (C.D. Cal. 1989) (dismissal of debtor's Chapter 11 petition on bad faith grounds was proper where debtor's sole asset was a parcel of real property, there was only one secured creditor, debtors had no employees, debtors were not operating business, debtors' joint monthly income was inadequate to sustain plan of reorganization, and debtors had relatively few unsecured creditors); *In re Randy Homes Corp.*, 86 B.R. 259 (M.D. Fla. 1988) (dismissal of case for cause on basis of bad faith filing was warranted where debtor's only asset was undeveloped real property, debtor had no income, debtor had no employees, debtor never made any attempts to develop the real property, debtor had no viable business entity to rehabilitate, and debtor filed petition merely to forestall state foreclosure action); *In re Trident Associates*, 52 F.3d 127 (6th Cir. 1995) (dismissal of debtor's Chapter 11 petition was proper where debtor did not have any equity in property which constituted debtor's sole asset, debtor filed its petition after commencement of the foreclosure sale with intent to delay

effect of the foreclosure sale, and debtor did not have any other ongoing business to reorganize).

In its Petition, CWVD has not attempted to distinguish the striking similarity between the *Carolin Corp.* case from the case at bar. Instead, CWVD has simply been critical of the Bankruptcy Court for not conducting the "series of hearings" conducted by the bankruptcy court in the *Carolin Corp.* case. However, while the factual similarities between the *Carolin Corp.* case and the case at bar are remarkable, there are *significant* differences between the procedural history behind the *Carolin Corp.* case and the case at bar which explains the decision of the Bankruptcy Court but which are simply ignored in the Petition of CWVD.

The critical difference in the procedural posture between the *Carolin Corp.* case and the case at bar is the fact that the bankruptcy petition which was dismissed by the Court in the *Carolin Corp.* case was the first petition which had been filed by the debtor in that case, whereas in the CWVD case, the Bankruptcy Court had previously given CWVD extensive opportunities to reorganize in a previous bankruptcy proceeding and was therefore already familiar with the tortured history of CWVD's unsuccessful attempts to develop its property or to reorganize.

Consequently, the bankruptcy court in the *Carolin Corp.* case necessarily required a more extensive evidentiary hearing because there were no facts which were previously known to that Court prior to conducting the hearings which led to the dismissal of the bankruptcy petition filed by *Carolin Corp.*

It was only upon conducting its hearings that the bankruptcy court in the *Carolin Corp.* case first learned of "a number of factors suggesting that Carolin's bankruptcy filing was not in good faith", including that:

> (a) Carolin was a one-asset entity "revitalized" on the eve of the foreclosure to isolate insolvent property and its creditors;
>
> (b) the existence of other "indicia" of bad faith filings such as the fact that the debtor had no substantial secured or unsecured claims other than the claims of a single secured creditor; and
>
> (c) a prior history of default and foreclosure on the same property with the same secured creditor. *Carolin Corp.* at 696.

In the CWVD case at bar, each of these factors were already known to the Bankruptcy Court since it had become aware of such facts in the course of CWVD's first bankruptcy.

In addition, the Bankruptcy Court was able to take judicial notice or was aware of numerous additional factors, such as:

> (a) the failure and refusal of CWVD to comply with previous Orders issued by the Bankruptcy Court in the first bankruptcy;
>
> (b) CWVD's failure to file any disclosure statement, plan of reorganization, or any other document indicating an ability or intention to successfully reorganize;
>
> (c) the Order of the State Court in which CWVD was ordered to transfer the Premises to Fry and which specifically found that "Jerry A. Berardi [the president of CWVD] has willfully

> and intentionally manipulated the settlement process in order to avoid a trial date previously scheduled in this matter and finds that sanctions are appropriate"; and
>
> (d) the decision of the Supreme Court of Appeals of West Virginia declining to accept the appeal filed by CWVD.

Based on the foregoing, it was not necessary and would have been a waste of judicial resources for the Bankruptcy Court to conduct the "series of hearings" which CWVD erroneously believes is required by the *Carolin Corp.* case. CWVD apparently misses the point of the "series of hearings" conducted by the bankruptcy court in *Carolin Corp.* Conducting hearings and taking evidence is not performed for its own sake, but rather to obtain facts necessary to render a decision. In the CWVD case, the Bankruptcy Court was able to rely, in part, on facts previously presented and known to it and was able to take judicial notice of the terms of previous Orders which had been entered as well as orders of the Harrison County Circuit Court and the West Virginia Supreme Court of Appeals.

The conclusions reached by the Bankruptcy Court were also shared by the District Court. In a hearing conducted following CWVD's appeal to the District Court, Judge Maxwell stated that "the Bankruptcy Court had ample evidence before it to determine that the second Chapter 11 Petition was filed in bad faith." The District Court further concluded that:

> It is apparent from the record that is before this Court that the debtor is attempting to use the

> bankruptcy court and the Chapter 11 proceedings, to circumvent the final judgment of the Circuit Court of Harrison County, West Virginia, which in effect has been upheld by the denial of the appeal of that judgment order by the West Virginia Supreme Court of Appeals.

C. The Decision To Dismiss The Second Bankruptcy Petition Of CWVD Was Properly Based On The Bankruptcy Court's Respect For Previous State Court Decisions.

In addition to the factual background which the Bankruptcy Court took into consideration in finding cause under 11 U.S.C. § 1112(b) and *Carolin Corp.* to dismiss the second bankruptcy petition of CWVD, the Bankruptcy Court also considered the effect of the dispositive state court decisions of the Harrison County Circuit Court and the West Virginia Supreme Court of Appeals.

In recognizing the validity of the State Court orders, the Bankruptcy Court denied CWVD's Motion for Stay and stated that:

> The Court was further presented with an order of the Circuit Court of Harrison County, West Virginia, wherein the state court ordered the enforcement of a settlement agreement which would effectively remove the property from the bankruptcy estate. In the interests of comity, this Court declined to continue to exercise jurisdiction over the subject property as that would effectively overrule the state court order which should be accomplished by appeal, not the filing of a bankruptcy petition.

The decision of the Bankruptcy Court to rely upon and respect the interest of comity in connection with bankruptcy proceedings is supported in numerous bankruptcy cases. For instance, in *In re Highway Truck Drivers and Helpers Local Union Number 107*, 888 F.2d 293 (3rd Cir. 1989), the Federal Court of Appeals determined that the judgment of a state Supreme Court validly entered after the bankruptcy court granted relief to an interested party was conclusive in the federal proceeding, and the full faith and credit clause under 28 U.S.C. § 1738 and doctrines of federalism and comity precluded a federal district court from nullifying the state court judgment by reversing the order of the bankruptcy court. The Federal Court of Appeals stated that: "To hold otherwise would allow the District Court to nullify retroactively a validly entered state court judgment, thereby emasculating the fundamental doctrines of federalism and comity". *Id.* at 299.

Numerous other courts have come to similar conclusions. See *Credit Alliance Corp. v. Penn Hook Coal Company*, 77 B.R. 57 (W.D. Va. 1987), affd. 851 F.2d 119 (4th Cir. 1988) (a bankruptcy court and district court must give full faith and credit to a state court judgment granting judgment to a creditor against a debtor entered in the state court); *In re Farrell*, 27 B.R. 241 (Bky. Ct. E.D. N.Y. 1992) (bankruptcy court was to give full faith and credit to prior final state court judgment in same manner as would court in that state); *In re Morton*, 43 B.R. 215 (Bky. Ct. E.D. N.Y. 1984) (bankruptcy courts must give full faith and credit to final state court actions with only two exceptions which provide the basis for challenging state action: (1) want of jurisdiction of state court over persons

or parties or subject matter of suit and (2) procurement of state court judgment by fraud); *Kitces v. Wood*, 917 F.Supp. 338 (D.N.J. 1996) (Principles of comity and Full Faith and Credit Act mandate that judicial proceedings of any state shall have full faith and credit in every court within the United States as they have by law or usage in courts of such state from which they are taken); *In re First Actuarial Corp. of Illinois*, 182 B.R. 178 (Bky. Ct. W.D. Mich. 1995) (bankruptcy courts, that are presented with final state court judgments must give them same preclusive effect that another state court would give the judgments); *W.S. Frey Company v. Precipitation Associates of America, Inc.*, 899 F.Supp. 1527 (W.D. Va. 1995); *Bowers v. Connecticut National Bank*, 78 B.R. 388 (D. Conn. 1987); *Allen v. McCurry*, 101 S.Ct. 441, 449 U.S. 90, 66 L.Ed. 2d 308 (1980) (Federal courts generally accord preclusive effect to issues decided by state courts not only to reduce unnecessary litigation and foster reliance on adjudication, but also to promote the comity between state and federal courts that has been recognized as a bulwark of the federal system).

CONCLUSION

The appeals which have been filed by CWVD with the District Court and the Fourth Circuit Court have been properly dismissed as being moot by virtue of the transfer of the Premises from CWVD to Fry in accordance with final state court orders. Petitioners have failed to demonstrate any compelling reason for this Supreme Court to exercise its discretion pursuant to Rule 10.

For the foregoing reasons, Fry respectfully requests this Court to deny the Petition for Writ of Certiorari filed by CWVD.

Respectfully submitted,

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